APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

At Richmond

Civil Action No. 2432

SOUTHERN RAILWAY COMPANY, *et al, Plaintiffs*

v.

THE UNITED STATES OF AMERICA; *et al, Defendants*

(Argued February 20, 1957
Decided June 19, 1957)

Before SOBELOFF, Circuit Judge, and HUTCHESON and BRYAN, District Judges

Thomas B. Gay, Esquire
James T. Bistline, Esquire
Attorneys for Plaintiffs

Victor R. Hansen, Esquire, Assistant Attorney General, Lester S. Parsons, Jr., Esquire, United States Attorney, James E. Kilday, Esquire and Charles R. Esherick, Attorneys, Department of Justice
Attorneys for the defendant United States of America

Robert W. Ginnane, Esquire, General Counsel
Samuel R. Howell, Esquire, Associate General Counsel
Attorneys for the defendant Interstate Commerce Commission

John W. Adams, Jr., Esquire, Charles P. Reynolds, Esquire, W. A. Miller, Esquire, Clifford T. Coomes, Esquire, Martin A. Meyer, Jr., Esquire, R. B. Clayton, Esquire, R. B. Gwathmey, Esquire, Walter C. Scott, Jr., Esquire, John S. Davenport, III, Esquire
Attorneys for railroad intervenors, defendants and counter-claimants

Robert N. Burchmore, Esquire
Attorney for Cramet, Incorporated, Intervening Defendant

HUTCHESON, District Judge:

Southern Railway Company, hereinafter referred to as Southern, and The Cincinnati, New Orleans and Texas Pacific Railway Company, hereinafter referred to as C.N.O. & T. P., and collectively the two referred to as plaintiffs, bring this action under Sections 1336, 1398, 2284 and 2321-2325 of Title 28, U.S.C., and *Section 1009 of Title 5, U.S.C.*, to set aside and permanently enjoin the third ordering paragraph of the order of the Interstate Commerce Commission, entered in its docket No. 31737, *Cramet, Inc.* v. *Alabama Great Southern Railroad Co., et al, 298 I.C.C., 439*, dated May 4, 1956, as amended July 6, 1956, and affirmed October 1, 1956, requiring the C.N.O. & T.P. to restore Boyce, Tennessee, to the reciprocal switching limits of Chattanooga, Tennessee.

Cramet, Inc., and certain railroads which were also defendants in the proceedings before the Interstate Commerce Commission, were permitted to intervene under the provisions of *Section 2323 of Title 28, U.S.C.*, and *Rule 24(a) of Federal Rules of Civil Procedure* as defendants and to file their responsive pleadings.

The plaintiffs on November 16, 1956, were granted a temporary restraining order by this Court, restraining the Interstate Commerce Commission from enforcing the third ordering paragraph of the order of May 4, 1956, as affirmed by order of October 1, 1956.

Stripped of non-essentials, the issue before the Court is a narrow one and may be dealt with somewhat briefly.

Boyce, Tennessee, is what is known as an agency station in an unincorporated community, situated about 5.5 miles northeast of the Southern Railway freight station in Chattanooga, and outside the corporate limits of that city. The station house of C.N.O. & T.P. is actually within the corporate limits. The area generally is bounded by the main line of the C.N.O. & T.P. on the east, Chickamauga Creek on the north, the Tennessee River on the west and on the south by a line commencing at the river just south of

the Quaker Oats plant and running in an easterly direction to the main line of the C.N.O. & T.P. A portion of the area is in the city limits of Chattanooga. At the southeastern edge is located the modern electronic railroad yard of Southern known as Citico Yard. This yard and the main line of C.N.O. & T.P. lie between the industries served by C.N.O. & T.P. at Boyce and the main line of the N.C.&St.L.* from Atlanta to Chattanooga. The area is an industrial one and for more than fifty years has been served by the C.N.O. & T.P. by means of a track known as the River Track branching from the main line of the C.N.O. & T.P. and extending in a westerly direction to a point near the edge of the river. Anticipating the completion of certain dams across the Tennessee River, which would result in an increase in the value of real estate in this area for industrial purposes, Southern which controls C.N.O. & T.P. through stockholdings, acting through one of its subsidiaries, acquired a large tract of land within the area. C.N.O. & T.P. has spent considerable sums in the construction of additional trackage into the area. With the danger of damage from flood waters of the Tennessee River eliminated by the dam, the desirability of Boyce as sites for industrial plants has increased and additional industries have located there, including Cramet, Incorporated, a subsidiary of the Crane Company. Cramet, Incorporated, operates a Titanium plant which utilizes considerable quantities of rutile ore, a raw material used in the production of titanium metal, which is obtained in some quantities from this country and also from foreign countries. While there has been considerable discussion concerning the tariff on rutile ore, as will be seen freight tariffs are not involved here but we are concerned solely with reciprocal switching. Historically, the Boyce area has been within the switching limits of the City of Chattanooga, extending back as far as the beginning of the operation of the C.N.O. & T.P. into Chattanooga in 1881 and through routes and joint rates have been in effect for many

* The Nashville, Chattanooga & St. Louis Railway.

years, with daily exchange between the various carriers. In 1952 Cramet, after considering numerous other sites for the location of its large plant, (one site valued at $97,000.00, offered to it for only $1.00, which was declined) acquired a site within the Boyce area. One of the principal reasons for the selection of the Boyce site was that rail service was limited to a single spur, being one railroad at the other site, and that site was not within the Chattanooga switching district. During negotiations regarding locating this plant, representatives of Cramet were solicited by representatives of various organizations including Southern to establish a plant at Chattanooga, it being pointed out that such site was within the Chattanooga switching district. No intimation was made concerning the possibility of any change in that regard. As a result Cramet selected the site and commenced construction of a plant, representing an investment in excess of $25,000,000.00. On June 23, 1954, after construction had commenced, C.N.O. & T.P. cancelled the reciprocal switching arrangements then in effect, except in instances where the rate from or to Chattanooga is different from the line-haul rate on a like shipment from or to Boyce. In reality, the rates from or to Boyce and Chattanooga are so seldom different that the effect of the action was that on competitive traffic destined to or from Boyce, C.N.O. & T.P. refused to switch. The result of this action was to deny access into Boyce of shipments over competing lines except upon condition it receive a division of the line-haul rate, and to deprive the shippers in the Boyce area of the benefit of competitive rates and service.

Several proceedings before the Interstate Commerce Commission, referred to in the pleadings, which involve tariffs were had before the Interstate Commerce Commission.

In No. 31737 Cramet alleges that the action of the plaintiff here is unjust, unreasonable and unduly prejudicial; that the action of June 23, 1954, was designed to deny the industries in the Boyce area the switching rates from and to points of interchange at Chattanooga; deprived Cramet

of valuable services received from connecting railroads in violation of Sections 1 and 3 of the Act and in restraint of competition in contravention of the National Transportation Policy. The only question with which we are here concerned is the one presented by that portion of Docket No. 31737 in which the Commission found that "the refusal of the Southern to treat Boyce as a point entitled to switching service from and to Chattanooga at a switching charge, and the maintenance of a provision which results in rates and charges on traffic to or from Boyce when the line-haul routing to or from Chattanooga is over lines other than those of the defendant, higher than those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga, is unjust and unreasonable".

In conformity with the foregoing findings, on May 4, 1956, the Commission issued its order containing what is referred to as the third ordering paragraph reading as follows:

> "*It is further ordered*, That said defendants (plaintiffs here), according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 10, 1956, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act and thereafter to maintain and apply to the transportation of carload traffic requiring switching over the rails of the defendant Cincinnati, New Orleans and Texas Pacific Railway Company from Chattanooga, Tenn., to Boyce, Tenn., or in the reverse direction, switching charges, and provisions relating thereto, that will result in the maintenance of rates and charges, when the line-haul routing is over lines other than the defendant, that are the same as those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga."

Subsequently stay orders were granted. On November 16, 1956, Southern published rates to become effective December 20, 1956, the result of which is to exclude other carriers involved from participating in traffic to Boyce be-

cause of the restriction that the rates apply over its own lines only. The tenor and effect of the findings and order of the Commission bring into focus the issues here involved. The C.N.O. & T.P. by its action of June 23, 1954, in denying competing carriers reciprocal switching services from Chattanooga to Boyce and the publication by Southern of its tariff of November 16, 1956, result in depriving shippers at Boyce of the advantages of competitive services and competitive carriers are foreclosed from participating in transporting freight to Boyce unless there is a division of the line haul rate with Southern. A restoration of the reciprocal switching arrangement in effect for many years would relieve this situation. While applicable rates have been involved in this and related proceedings, the rates themselves are not here in controversy and no useful purpose would be served by a detailed discussion of that phase of the proceedings before the Commission.

From the pleading and exhaustive briefs of counsel, it appears that four general issues are presented for consideration: (1) what is the scope of review by the Court; (2) is the order of the Commission dated May 4, 1956, as amended by subsequent stay orders founded on sufficient findings, are the findings supported by sufficient evidence, and are the findings clear and unambiguous; (3) does Section 15(4) of the Interstate Commerce Act (49 U.S.C., 15(4)) have application in this case; (4) are the defendants entitled to relief on the counter-claim, and if so, what is their remedy.

The scope of review by a three-judge court is a well settled rule that can best be generalized to the effect that where the Commission's orders lie within the scope of the Commission's statutory authority and are based upon adequate findings, supported by substantial evidence, they should not be set aside, modified or disturbed by the court on review. Application of this rule to the instant case answers the second issue raised herein (supra). The Commission in affirming the amended order of May 4, 1956, thereby adopted said order. The facts were discussed in

detail, the contentions of all parties were set forth and the findings of the Commission were based thereon. The ordering paragraph complained of was founded upon the findings set forth. The result (i.e., findings) of the order was implicit in the order itself and can not be labeled unclear or ambiguous merely because of disagreement therewith. The courts have been uniform in holding that they should not go behind a final administrative order and that the test is sufficient findings, supported by substantial evidence. In this instance a review of the record discloses that the findings of the Commission are adequate and supported by ample evidence and it follows that the order of May 4, 1956, was in full compliance with the rule.

The contention of Southern to the effect that the Commission by the order of May 4, 1956, would short-haul Southern contrary to Section 15(4), 49 U.S.C.,** was answered fully by the Commission in its report at page 445.*** The

** Section 15(4) reads in part as follows:

"(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. * * *."

*** The report contains the following language:

"It is the position of the Cincinnati, New Orleans & Texas Pacific that it cannot be required to perform terminal services for other lines under a switching arrangement since it would thereby be short hauled in violation of section 15(4), citing City of Sheboygan, Wis., v. Chicago & N.W. Ry. Co., 227

distinction between the *City of Sheboygan, Wis., et al* v. *Chicago and North Western Railway Co., et al.* 227 I.C.C. 472, relied upon by Southern, and the present case is twofold. In the instant case sufficient public interest has been shown on the record to warrant the Commission's affirmative action and such public interest was held to be lacking in the *Sheboygan* case. Secondly, historically, the record indicates that Boyce and Chattanooga were treated in all the tariffs identically until June 23, 1954. Thus, it is to be borne in mind that the Commission is not now establishing a through route and joint rate under *Section 15(3), Title 49, U.S.C.* Upon the contrary, the action of plaintiffs, in effect, is the cancellation of an existing through route and joint rate without the consent of all carriers party thereto or authorization by the Commission. The action on the

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I.C.C. 472; Northwest Metal Products, Inc., v. C., M., St. P. & P.R. Co., 272 I.C.C. 401; and Whatcom County Traf. and Rates Bur. v. G.N. Ry. Co., 293 I.C.C. 119, among others. In those proceedings the Commission was asked to require the carriers which originated traffic to turn that traffic over to other carriers at points of origin, which would have created new routes over which the carriers on whose lines the traffic originated would have been short hauled. Here the issue is the lawfulness of a proposal by the Southern to exclude established routes from the application of reduced rates, which requires a showing that the proposal is consistent with the public interest. There is no warrant for the maintenance to Boyce or to Chattanooga of higher rates over some than over other routes, if the cancellation of routes as proposed is not shown to be consistent with the public interest. Where the Commission is not asked to establish through routes and the cancellation of routes is not shown to be consistent with the public interest, section 15(4) has no application. See United States v. Great Northern Ry. Co., 343 U.S. 562.

"The tariff provision designed to accomplish the removal of these industries at Boyce from the benefit of switching services from and to Chattanooga, except in stated situations, is quoted in the appendix hereto. It appears that the result thereof is the division of charges from joint rates applicable to and from Boyce other than by the absorption of a switching charge. The only condition under which the traffic will be switched at a switching charge, according to those provisions, is an absence of the same rates to or from both Boyce and Chattanooga. The evidence indicates that few, if any, rates to Boyce are not the same as those on like traffic to Chattanooga."

part of plaintiffs having been suspended by the Commission for investigation, the burden is upon plaintiffs to show its action is consistent with the public interest. This they have not done. It follows that plaintiffs are not giving up any rights or privileges exercised prior to June 23, 1954.**** It also follows that the conclusion of this Court is that plaintiffs are not shorthauled by the order of May 4, 1956, contrary to *Section 15(4), Title 49, U.S.C.*

The relief sought by defendant in the counter-claim restated simply is, the prompt compliance by plaintiffs with the orders of the Interstate Commerce Commission. Therefore the Court having held that the plaintiffs are not entitled to relief from the order of the Commission of May 4, 1956, affirmed October 1, 1956, it follows that the temporary restraining order should be annulled and that plaintiffs be ordered to comply promptly with the orders of the Commission. Plaintiffs' petition for a permanent injunction will be denied.

**** See Atchison, T. & S.F. Rwy. Co. v. United States, 279 U.S., 768; and United States v. Great Northern Rwy. Co., 343 U.S. 562.

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INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 6284[1]

RUTILE ORE FROM GULF AND SOUTH ATLANTIC PORTS TO TENNESSEE

Decided May 4, 1956

1. In I. and S. No. 6284, rates and routes proposed for rutile ore, in carloads, from South Atlantic and Gulf ports to Boyce and Chattanooga, Tenn., found not shown to be just and reasonable. Proposed schedules ordered canceled, and proceeding discontinued.
2. In No. 31677, found that defendant's refusal to join in the establishment and maintenance of reduced rates on rutile ore, in carloads, from South Atlantic and Gulf ports to Boyce, over routes presently maintained, is unjust and unreasonable.
3. In No. 31737, found (1) that rates maintained by defendants on rutile ore, in carloads, from South Atlantic and Gulf ports to Chattanooga and Boyce, were and are unjust and unreasonable; just and reasonable rates prescribed, and reparation awarded; and (2) that a tariff provision which would have the effect of removing Boyce from switching services at switching charges from and to Chattanooga, is unjust and unreasonable, and a lawful adjustment prescribed.

James A. Bistline, James L. Tapley, Walter C. Scott, Jr., William A. Miller, Clifford T. Coomes, Felix E. Autrey, and *U. B. Ellis* for respondents in I. and S. No. 6284.

Louis A. Schwartz, E. Del Wood, and *James U. Nichols* for protestants in I. and S. No. 6284.

Walter C. Scott, Jr., for complainant in No. 31677.

Felix E. Autrey, U. B. Ellis, and *William A. Miller* for interveners in No. 31677.

John S. Burchmore and *Robert N. Burchmore* for complainant in No. 31737.

George D. MacLean, E. Del Wood, and *James U. Nichols* for interveners in No. 31737.

James A. Bistline for defendants in Nos. 31677 and 31737.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, WINCHELL, AND MURPHY

BY DIVISION 2:

Exceptions to the report proposed by the examiner were filed by the Southern Railway Company system lines, which are respondents

[1] This report embraces also No. 31677, Central of Georgia Railway Company v. Cincinnati, New Orleans & Texas Pacific Railway Company, and No. 31737, Cramet, Inc. v. Alabama Great Southern Railroad Company et al.

and defendants. The complainants and certain other respondents and defendant rail carriers replied. Exceptions and requested findings not discussed in this report nor reflected in our finding or conclusions have been considered and found not justified.

By schedules indicated to become effective on November 9, 1954, the respondent rail carriers in southern territory proposed reduced commodity rates[2] on rutile ore, in carloads, from South Atlantic and Gulf ports to Chattanooga and Boyce, Tenn., for application over certain routes. Upon protest of various port authorities, shippers, and certain of the rail carriers, the proposed schedules were suspended to and including June 8, 1955, and they have been voluntarily postponed by the respondents until June 8, 1956.

In No. 31677, the Central of Georgia Railway Company, hereinafter called the Central, complains that the defendant The Cincinnati, New Orleans and Texas Pacific Railway Company, hereinafter called the Cincinnati, New Orleans & Texas Pacific, has published reduced commodity rates on rutile ore from named South Atlantic and Gulf ports to Boyce, in which certain other carriers would be allowed to participate but which would exclude the complainant and interveners, in violation of sections 1 (4) and 3 (4) of the Interstate Commerce Act. The Tennessee, Alabama & Georgia Railway Company, the Atlantic Coast Line Railroad Company, and The Nashville, Chattanooga and St. Louis Railway, hereinafter called the Nashville, Chattanooga & St. Louis, intervened in support of the complaint. The alleged violation of section 3 (4) of the act need not be considered in view of findings made as to other issues in these proceedings.

In the complaint in No. 31737, filed February 24, 1955, the complainant, Cramet, Inc., alleges that the rates maintained by the defendants on rutile ore, in carloads, from South Atlantic and Gulf ports to Boyce, where the complainant maintains a plant for the processing of rutile ore, were, are, and for the future will be unjust, unreasonable, and unduly prejudicial, in violation of sections 1 and 3 of the act, to the extent that they exceeded, exceed, or may exceed $7.50, for application from shipside. Reparation is sought. Shipments were made in September and November 1954. The complainant alleges also that the defendant Cincinnati, New Orleans & Texas Pacific, by the operation of a tariff provision in effect since June 23, 1954, designed to deny to industries at Boyce, switching service at switching rates from and to points of interchange at Chattanooga, deprives the complainant of many valuable services received from connecting railroads serving Chattanooga, in violation of sections 1 and 3 of the act, and in restraint of competition in contravention of the national transporta-

[2] Rates are herein stated per ton of 2,000 pounds except as otherwise indicated, and do not include the general increases authorized in Ex Parte Nos. 175 and 196.

tion policy. We are asked to prescribe reasonable rates and to require defendants to provide for the switching of traffic at a switching charge between Boyce and the points of interchange with connecting lines at Chattanooga, that will, by reason of the absorption of the charge, result in rates the same as those to and from Chattanooga. The Central Soya Company, Inc., the Chattanooga Chamber of Commerce, and the Chattanooga Manufacturers Association intervened in support of the complaint.

The proposed reduced rates to both Chattanooga and Boyce, which would apply from shipside, subject to a minimum of 80,000 pounds, are $7.40 from Savannah, Ga., $9.50 from Newport News and Norfolk, Va., and $8.50 from the various other South Atlantic and Gulf ports. The Central also proposed a proportional rate from Savannah to Chickamauga, Ga., of $3.90, to apply on shipments destined beyond Chickamauga. This rate added to the applicable class rate from Chickamauga to Boyce, would result in a rate of $7.50 from Savannah to Boyce. This method of publication was deemed necessary because of the refusal of the Southern[3] to permit the Central to participate in the proposed single-factor rate from Savannah to Boyce.

Rutile ore is a source of titanium, and is obtained in Australia as well as from certain sources in this country. Cramet, Inc., is a wholly owned subsidiary of the Crane Company and was organized to engage in the production of titanium from rutile ore. Except for two shipments which are not here concerned, Cramet's shipments of record from Australia moved through the ports of Savannah and Charleston, S. C., to Boyce at class rates of 52 and 55 cents per 100 pounds, or $10.40 and $11 per ton, respectively. In addition to the line-haul class rate, there are also certain terminal charges for movement from shipside which amount generally to $1.10 per ton. The rutile ore, which resembles a sandy clay, could be shipped loose, although Cramet's shipments have been in bags. It has a value of about $100 per ton, and is not susceptible to damage from the weather.

The choice of Boyce as a site for Cramet's plant, which, when completed, will cost in excess of $25 million, was influenced largely by the fact that, in addition to being suitable from a physical standpoint, Cramet was informed that the plant would be within the switching limits of Chattanooga. Prior to the selection of the site chosen, two other sites in Chattanooga had been considered and rejected. One of these sites was offered to this complainant at the price of $1, but, despite the fact that it was valued at almost $100,000, the site was rejected because it was not within the switching limits of Chattanooga. Another

[3] The term Southern as used herein refers to the various component lines comprising the Southern Railway system, which as far as herein pertinent include The Alabama Great Southern Railroad Company, the Cincinnati, New Orleans & Texas Pacific, and the Southern Railway Company.

te, at Nashville, Tenn., had been considered, and when the site finally
osen was first considered the Nashville site had been practically
reed upon, and a statute was enacted by the Tennessee Legislature to
rmit the sale of the site, which was State-owned, to the complainant.
uring the negotiations for the site chosen at Boyce, it was pointed
t to the complainant that it would have the advantage of being
thin the Chattanooga switching limits; and that is alleged to have
en one of the prime considerations leading to the choice of the site.
A representative of the Southern was present at most of the negotia-
ons and gave no indication of a probability of exclusion of industries
Boyce from the Chattanooga switching limits. Also, a representa-
ve of the Southern informed the complainant that the chosen site was
termediate to two industries then in the switching limits and that the
rrier's terminal tariff provided that an industry at such an interme-
iate site would automatically be included in the switching limits.
evertheless, a few months after the site was chosen and before the
ant was completed, the Cincinnati, New Orleans & Texas Pacific
tablished certain provisions in its terminal tariff which had the prac-
cal effect of removing Boyce from the Chattanooga switching limits,
least insofar as the traffic here in issue is concerned.

There have been negotiations concerning rates between Cramet and
e rail carriers serving certain of the ports and Chattanooga and
oyce since shortly after the plant was located at the latter point.
he principal rail parties engaging in these negotiations have been
e Central and the Southern. Savannah is the port nearest to the
estination, and it is considered the key port in the establishment of
ates on this traffic. The Southern first proposed import rates there-
om equal to the present class rates, which do not apply from ship-
de, thus reducing the through charges from shipside by about $1.10
er ton, and the Central proposed a rate of $8.50 from shipside. The
outhern indicated an intention to establish a through rate restricted
o its own single-line operation between Savannah and Boyce, and the
entral announced that it would establish a proportional rate to Chick-
mauga, which, in connection with the class rate beyond, would pro-
ide a through rate the same as that proposed by the Southern. The
tter then announced that it would undercut any rate established by
e Central by 10 cents a ton. The result was the publication of the
ates now under suspension. The Southern protested its own rate of
7.40, as well as the proportional rate of $3.90 to Chickamauga estab-
shed by the Central.

The presently applicable class 25 rates on rutile ore, minimum 60,000
ounds, converted to amounts per net ton, from various ports to Chatta-
ooga and Boyce are as follows:

From—	Rates	From—	Rates
Norfolk, Va.	$13.20	Panama City, Fla.	$11.00
Charleston, S. C.	11.00	Pensacola, Fla.	10.40
Savannah, Ga.	10.40	Mobile, Ala.	10.60
Brunswick, Ga.	10.60	Gulfport, Miss.	11.00
Jacksonville, Fla.	11.40	New Orleans, La.	11.60

As stated, certain terminal charges for handling from shipside at the ports increase the through charges by about $1.10 per ton when the movement is at class rates.

None of the respondents other than the Southern contends that the class 25 rates are reasonable for this traffic. The Southern takes the position that the class rates are not in excess of reasonable maxima, but is agreeable to the establishment of a rate of $8.50, minimum 80,000 pounds, from all the ports other than the Hampton Roads ports, and a rate $1 higher from the latter ports. The Central contends that $7.50, minimum 80,000 pounds, is a maximum reasonable rate from shipside at Savannah, which is the only port served by the Central. Cramet takes the position that a rate in excess of $7.50 is unreasonable and asks reparation on past shipments to that basis.

In support of the proposed rate of $7.50 from Savannah, the Central shows that, when increased by the surcharge of 15 percent authorized in Ex Parte No. 175 and diminished by the current terminal charges at the port, this rate for the average weight of the shipments of record, about 51 tons, would yield $383.78 per car and 85.35 cents a car-mile over the short tariff route of 449 miles. A rate of $7.50, less the terminal charges, would yield, for the average distance from Savannah to Boyce, 13.3 mills a ton-mile, and, on a minimum loading of 40 tons, about 53 cents a car-mile. The average distance from all the ports to Boyce is about 620 miles. Based on this distance and the minimum, a rate of $7.50 less the port terminal charges would yield but slightly more than 10 mills a ton-mile and 41 cents a car-mile, while a rate of $8.50 would yield about 12 mills a ton-mile and 47.7 cents a car-mile. A rate of $8.50 plus the surcharge of 15 percent, less terminal costs of $1.10, would yield, for the average distance from all the ports to Boyce, about 14 mills a ton-mile and a minimum of 56 cents a car-mile. Based on the average loading and actual distances of 451 and 536 miles over routes used from Savannah and Charleston, the present rates yield from $1.05 to $1.18 a car-mile and from 20.5 to 23.1 mills a ton-mile.

In support of its contention that a rate of $7.50 would be reasonable on this traffic, Cramet shows that this rate, less the terminal charges, would approximate 15.5 percent of the first-class rate from Savannah to Boyce, and that certain rail carriers now maintain rates approximating 15.9 percent of first class on rutile ore from points in Florida to points in New York. This complainant also shows that certain rates

on comparable ores, such as ilmenite and zircon, are maintained between numerous points on bases ranging from 12.1 to 17 percent of first class. These rates are maintained for distances substantially greater than those from the ports to Boyce. The Southern contends, on exceptions, that the rates with which comparisons are made are depressed rates, established for various reasons such as water competition, at less than maximum reasonable levels. A rate of $8.50 would range from 17.7 to 20.4 percent of first class from the various ports south of Norfolk. The Southern instances prescribed rates on numerous commodities, not shown to be comparable with rutile ore, ranging from 25 to 35 percent of first class.

As to the question whether the attempt to curtail the routing presently available on this traffic is violative of any provision of the act, the Southern contends that it has the right to do so under the so-called short-hauling provisions of section 15 (4) of the act. It contends further that the Central has no right to establish a proportional commodity rate to an intermediate point which, in combination with the class-rate factor beyond the basing point, would result in a through rate for the transportation of this traffic over a route composed in part of the Central that would short haul the Southern. Under the provisions of section 15 (3) of the act, the cancellation, without the consent of all parties thereto, of any through route must be shown to be "consistent with the public interest" without regard to the short-hauling provisions of paragraph (4) of this section. In the establishment of routes by the Commission, the carrier that originates the traffic is entitled to reasonable preference, but this also must be "consistent with the public interest," and establishment of routes that short haul carriers may be required if such routes are needed to provide adequate and more efficient transportation.

The number of routes proposed from the various ports to Chattanooga and Boyce, in comparison with those available in connection with the present rates, are shown below.

From—	Number of routes published in connection with suspended rates on rutile ore from ports shown below to—		Normal number of tariff routes to—
	Boyce, Tenn.	Chattanooga, Tenn.	Chattanooga, Tenn.
Savannah, Ga.	1	1	36
Panama City, Fla.	4	10	11
New Orleans, La.	1	8	90
Gulfport, Miss.	4	10	43
Mobile, Ala.	2	8	58
Pensacola, Fla.	5	9	16
Jacksonville, Fla.	2	21	23
Brunswick, Ga.	1	10	19
Charleston, S. C.	1	19	40
Norfolk, Va.	11	19	21
Newport News, Va.	4	14	5

Of 89 shipments of record which moved prior to the hearing, 59 originated on the Central at Savannah, 14 on the Southern at that port, and 16 moved over the Southern from the port of Charleston. The Southern operates from and to the docks at Savannah only over the tracks of the Central, over which the Southern enjoys trackage rights. What the Southern is proposing for application from Savannah includes the use of the tracks and dock facilities of the Central at Savannah in the effort to eliminate the latter as a competing carrier. The established through routes between the ports and Boyce have been in use more than 50 years. They would continue to be open for the movement of traffic at the presently applicable joint class rates if the proposed rates were to become effective.

It is the position of the Cincinnati, New Orleans & Texas Pacific that it cannot be required to perform terminal services for other lines under a switching arrangement since it would thereby be short hauled in violation of section 15(4), citing *City of Sheboygan, Wis.*, v. *Chicago & N. W. Ry. Co.*, 227 I. C. C. 472; *Northwest Metal Products, Inc.*, v. *C., M., St. P. & P. R. Co.*, 272 I. C. C. 401; and *Whatcom County Traf. and Rates Bur.* v. *G. N. Ry. Co*, 293 I. C. C. 119, among others. In those proceedings the Commission was asked to require the carriers which originated traffic to turn that traffic over to other carriers at points of origin, which would have created new routes over which the carriers on whose lines the traffic originated would have been short hauled. Here the issue is the lawfulness of a proposal by the Southern to exclude established routes from the application of reduced rates, which requires a showing that the proposal is consistent with the public interest. There is no warrant for the maintenance to Boyce or to Chattanooga of higher rates over some than over other routes, if the cancellation of routes as proposed is not shown to be consistent with the public interest. Where the Commission is not asked to establish through routes and the cancellation of routes is not shown to be consistent with the public interest, section 15(4) has no application. See *United States* v. *Great Northern Ry. Co.*, 343 U. S. 562.

The tariff provision designed to accomplish the removal of these industries at Boyce from the benefit of switching services from and to Chattanooga, except in stated situations, is quoted in the appendix hereto. It appears that the result thereof is the division of charges from joint rates applicable to and from Boyce other than by the absorption of a switching charge. The only condition under which the traffic will be switched at a switching charge, according to these provisions, is an absence of the same rates to or from both Boyce and Chattanooga. The evidence indicates that few, if any, rates to Boyce are not the same as those on like traffic to Chattanooga.

Boyce is an unincorporated community served by the Cincinnati, New Orleans & Texas Pacific and the Nashville, Chattanooga & St. Louis, and is shown in tariffs as a separate station. It is within the limits of the area served by the Citico yard of the Southern, embracing also Chattanooga and other surrounding industrial areas. The Boyce station house of the Cincinnati, New Orleans & Texas Pacific is actually within the corporate limits of Chattanooga, but the siding serving Cramet, Central Soya, and 3 or 4 other industries which diverges from the Cincinnati, New Orleans & Texas Pacific main line within the Chattanooga corporate limits at Boyce, leaves the corporate limits before reaching those industries. The Nashville, Chattanooga & St. Louis approaches Chattanoga from the South by means of a line extending around the city and passing through Boyce before reaching Chattanooga. The rails of the latter carrier parallel those of the Cincinnati, New Orleans & Texas Pacific, and others of the Southern's constituent lines, from a point somewhat north of Boyce to and through Chattanooga. The Southern Railway approaching Chattanooga from the South also swings around the city and joins the rails of the Cincinnati, New Orleans & Texas Pacific at a point north of Boyce. The movement of carload traffic from the terminals of connecting lines and the classification yard to industries at Boyce is by switching crews.

The rails of the Central enter Chattanooga from the South as do those of the Tennessee, Alabama & Georgia Railway Company, and these two carriers, as well as the Nashville, Chattanooga & St. Louis, interchange with the Southern at the same point in the classification yard of the latter which extends from the metropolitan area of Chattanooga to and beyond Boyce. The interchange point of the Southern with other main-line carriers is about 2.6 miles from the point at which the track serving Cramet, Central Soya, and other industries leaves the Cincinnati, New Orleans & Texas Pacific main line. It is thus seen, that while Boyce is listed as a separate station and is so treated in the tariffs of the Southern, it is partly within the Chattanooga corporate limits and is served by the classification and switching yards which serve Chattanooga.

The community of North Chattanooga is also partly within the corporate limits of Chattanooga. This community is reached by rail over a track diverging from the main line of the Cincinnati, New Orleans & Texas Pacific at some distance north of the point at which the Southern and the Nashville, Chattanooga & St. Louis approach those tracks from the east. This track of the Cincinnati, New Orleans & Texas Pacific serving North Chattanooga connects with the rails of the Chattanooga Traction Company, serving a portion of North Chattanooga, at C. & D. Junction lying north of the Tennessee River.

North Chattanooga is governed by a tariff provision similar to that shown in the appendix hereto. While it contains a statement that industries at North Chattanooga are included in the Chattanooga switching limits, it provides that the Cincinnati, New Orleans & Texas Pacific will perform switching to or from North Chattanooga only when the rates are different from those to or from Chattanooga. There has been no attempt to curtail routing to North Chattanooga as is proposed for the movement of rutile ore to Boyce.

The Jackson Manufacturing Company, located in the vicinity of Boyce, just across the main-line rails from the station house at that point, is served by the Belt Railway, a subsidiary of The Alabama Great Southern Railroad Company, one of the Southern's constituent lines. This industry is treated as within the switching limits and is accorded the benefit of reciprocal switching requiring a longer switching movement than is required for industries lying across the main-line tracks of the Cincinnati, New Orleans & Texas Pacific. Another industry, the Quaker Oats Company, is served by a switch track connecting with Southern in the classification yard at or near the point at which interchange is made with connecting lines. This switch track, like that serving Cramet and Central Soya, extends from the Southern's main line at a point within the corporate limits, but the industry itself is outside of the corporate limits. The industry is treated as within the Chattanooga switching limits and has the benefit of reciprocal switching. This firm is in competition with Central Soya, as are two or three other firms handling similar products that are within the Chattanooga switching limits.

Cramet insists that the disadvantages of location upon the rails of a single railroad are so great, due to difficulties encountered in securing satisfactory service, in obtaining empty cars, and in numerous other ways, that service to and from Chattanooga over more than one line was considered when it located its plant at Boyce. In support of this contention, it points to the fact that it had virtually decided to purchase a site at Nashville at a substantial price and make an initial expenditure of $100,000 for grading rather than accept a site at Chattanooga served by a single railroad, at a price of $1.

The Southern contends that Cramet will suffer no injury from a restriction of these movements to its single-line routes, since it provides superior service. This would deny to this complainant the benefit of a switching service at a switching charge and deprive it of competitive service to and from Chattanooga. The issue here is similar to that considered in *Agricultural Products Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 I. C. C. 505, wherein division 2 found that the practice of the defendant Southern Pacific Company in refusing to place within the Phoenix, Ariz., switching district tracks served by that defendant

in the vicinity of Tovrea, Ariz., was unjust, unreasonable, and unduly prejudicial and preferential.

In Investigation and Suspension Docket No. 6284, we find that it is not shown that the proposed cancellation of routes, in connection with the establishment of the proposed reduced rates, is consistent with the public interest, and that the proposed schedules therefore are not shown to be just and reasonable.

In No. 31677, we find that the defendant's refusal to join in the establishment and maintenance of reduced rates over routes presently maintained from South Atlantic and Gulf ports to Boyce, the same as proposed for application when the defendant receives a line haul into Chattanooga, is unjust and unreasonable.

In No. 31737, we find that the refusal of the Southern to treat Boyce as a point entitled to switching service from and to Chattanooga at a switching charge, and the maintenance of a provision which results in rates and charges on traffic to or from Boyce when the line-haul routing to or from Chattanooga is over lines other than those of the defendant, higher than those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga, is unjust and unreasonable.

We further find in No. 31737, that the rates presently in effect on rutile ore, in carloads, from the various South Atlantic and Gulf ports embraced herein to Chattanooga and Boyce were, are, and for the future will be unjust and unreasonable to the extent that they exceeded, exceed, or may exceed rates; subject to a minimum of 80,000 pounds, from shipside, of $8.50 from the various ports embraced herein other than Newport News and Norfolk, and of $9.50 from the latter two ports, plus applicable increases as authorized in Ex Parte Nos. 175 and 196.

We further find that the complainant in No. 31737 made shipments as described; and paid and bore the charges thereon at rates herein found unreasonable, was damaged thereby to the extent of a difference between the charges paid and those which would have accrued at the rates herein found reasonable, and is entitled to reparation, with interest. The complainant should comply with rule 100 of the General Rules of Practice.

Orders requiring cancellation of the schedules proposed in I. and S. No. 6284, and the establishment of an adjustment as prescribed in No. 31737, will be entered. In view of the requirements of the order entered pursuant to the findings in No. 31737, the entry of an order in No. 31677 is unnecessary. The establishment of rates as thus required will avoid and remove any undue prejudice and preference as alleged in No. 31737.

APPENDIX

ITEM 15. APPLICATION OF RATES TO AND FROM INDUSTRIES AND LOCATIONS AT B
TENN.

(1) The CNO & TP Ry. Co. will not switch carload traffic between Chattan
Tenn., and Boyce, Tenn., except as provided in paragraph (2) of this item.

(2) (*a*) Industries and locations on the CNO & TP Ry. Co. at Boyce, T
are included in the Chattanooga, Tenn., switching limits, and the CNO & TI
Co. will switch carload traffic between said industries and locations and
of interchange with connecting lines at Chattanooga, Tenn., only to the e
provided in subpar graphs (*b*) and (*c*) of this item.

(*b*) Where there is an applicable commodity rate or mileage scale ra
effect to or from (as the case may be) Chattanooga, Tenn., and the same
modity rate or mileage scale rate is not in effect via any line or route to or
(as the case may be) Boyce, Tenn., or

(*c*) When there is an applicable class rate in effect to or from (as the
may be) Chattanooga, Tenn., and the same class rate is not in effect via any
or route to or from (as the case may be) Boyce, Tenn.

APPENDIX C

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C., on the 4th day of May, A. D. 1956.

Investigation and Suspension Docket No. 6284
Rutile Ore—Gulf and South Atlantic Ports to Tennessee

It appearing, That by order dated November 8, 1954, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said order, and suspended the operation of said schedules to and including June 8, 1955, and that the respondents have voluntarily postponed the effective date of the schedules until June 8, 1956;

It further appearing, That a full investigation of the matters and things involved has been made, and that said division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel said schedules, on or before June 11, 1956, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

No. 31737

CRAMET, INC.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted

by the parties, full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 10, 1956, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of carload traffic from and to the points designated in the succeeding paragraphs hereof rates which exceed, and practices which differ from, those prescribed in said paragraphs.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 10, 1956, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation, in carloads, of rutile ore, minimun 80,000 pounds, rates which shall not exceed $8.50 per ton of 2,000 pounds from the Atlantic and Gulf ports embraced herein south of Norfolk Va., to Chattanooga and Boyce, Tenn., and $9.50 per ton of 2,000 pounds from Newport News and Norfolk, Va., to the said destinations, plus increases authorized in Ex Parte Nos. 175 and 196.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 10, 1956, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act and thereafter to maintain and apply to the transportation of carload traffic requiring switching over the rails of the defendant Cincinnati, New Orleans and Texas Pacific Railway Company from Chattanooga, Tenn.,

to Boyce, Tenn., or in the reverse direction, switching charges, and provisions relating thereto, that will result in the maintenance of rates and charges, when the line-haul routing is over lines other than the defendant, that are the same as those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga.

And it is further ordered, That this order in No. 31737 shall continue in full force and effect until the further order of the Commission.

By the Commission, division 2.

HAROLD D. McCOY,
Secretary

(SEAL)

APPENDIX D

Pertinent Provisions of the Interstate Commerce Act

Sec. 1 (4). It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Sec. 1 (5). All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and

reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 3 (5). If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Sec. 15 (3). The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject

to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

Sec. 15 (4). In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would par-

ticipate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

Sec. 15 (7). Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. * * *